

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

ASHLAND INC.,

Plaintiff,

v.

LEO H. LONG, JR., et al.,

Defendants.

CASE NO. C10-5889BHS

ORDER DENYING  
DEFENDANTS' MOTIONS TO  
DISMISS AND FOR  
SUMMARY JUDGMENT

This matter comes before the Court on motions to dismiss and for summary judgment of Defendants Leo H. Long, Jr. ("Leo Long") and Thomas C. Long ("Tom Long") (collectively, "Defendants"). Dkts. 10 & 14. The Court has considered the pleadings filed in support of and in opposition to the motions and the remainder of the file and hereby denies Defendants' motions to dismiss and for summary judgment for the reasons stated herein.

**I. PROCEDURAL HISTORY**

On December 7, 2010, Plaintiff Ashland, Inc. ("Ashland") filed a complaint against Defendants for breach of contract. Dkt. 1.

On February 9, 2011, Leo Long filed a motion to dismiss and motion for summary judgment seeking either dismissal of Ashland's claims under Rule 12(b)(6) of the Federal Rules of Civil Procedure or summary judgment of Ashland's claims based on collateral estoppel. Dkt. 10. On February 10, 2011, Tom Long joined in Leo Long's motion. Dkt.

14. On March 1, 2011, the Court signed the parties' stipulated motion to continue the hearing of Defendants' motions to March 18, 2011. On March 14, 2011, Ashland responded. Dkt. 18. On March 18, 2011, Leo Long replied (Dkt. 22) and Tom Long joined in that reply (Dkt. 23).

## II. FACTUAL BACKGROUND

### A. Complaint

Ashland alleges that each Defendant breached a contract with Ashland by refusing to indemnify and defend Ashland in an underlying personal injury lawsuit that was filed in the Superior Court for the State of Washington, Grays Harbor County. *See generally* Dkt. 1 ("Complaint"). The contract in question is a Purchase and Sale Agreement ("PSA") between Ashland<sup>1</sup>, Defendants, and Atlas Foundry & Machine Co. ("Atlas") dated May 2, 1985. *Id.*, Exh. 1 (the "PSA"). Atlas was the buyer, Defendants were the guarantors, and Ashland was the seller. PSA at 1. The sale involved stock and assets of Ashland's Foundry Division ("Foundry Business"). *Id.* Ashland alleges that the "PSA conveyed [Ashland's] interest in the Long Foundry located in Hoquiam, Washington to Atlas." Complaint, ¶ 7.

The PSA includes provisions regarding the assumption of liabilities, indemnification, and guaranteed performance. Ashland alleges these terms are as follows:

8. In Section 3.1(e) of the PSA, Atlas agreed to assume all claims and liabilities arising out of the operation of [Ashland's] Foundry Business, known or unknown, whether arising from acts, omissions or occurrences occurring before or after the Closing. *See* [PSA] at 8. On information and belief, Atlas is no longer an existing legal entity.

9. In Section 15.7 of the PSA, in recognition that [Ashland] could remain contingently liable for the same liabilities, Atlas agreed to indemnify

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<sup>1</sup>Although the named seller was Ashland Technology, Inc., there is currently no challenge to the assertion that Ashland is entitled to enforce all of Ashland Technology, Inc.'s rights under the PSA. Therefore, for the purposes of this order, the Court will refer to Ashland as the seller.

1 and hold Ashland harmless from and against any and all loss, cost, damage,  
2 claim and expense, including, without limitation, attorneys fees and  
disbursements, arising under or in connection with any obligations or  
liabilities assumed by Atlas. *See* [PSA] at 38.

3 10. In the PSA at Section 10, Leo H. Long Jr. and Thomas C. Long  
4 unconditionally guaranteed the performance of Atlas's obligations under the  
PSA and agreed to be jointly and severally liable on those obligations. *See*  
5 [PSA] at 26-27.

6 Complaint, ¶¶ 8-10.

7 In 2007, Judy Clauson filed a complaint for personal injuries against numerous  
8 Defendants including Ashland. *Id.*, ¶ 13 and Exh. B. Ashland alleges that Mrs. Clauson  
9 "sought damages for personal injuries allegedly suffered by Judy Clauson due to exposure  
10 to asbestos fibers brought home by her former husband while he was employed at the  
11 Long Foundry." *Id.*, ¶ 14. Ashland alleges that Mrs. Clauson's alleged injuries were  
12 covered by the indemnity provisions of the PSA and, therefore, Ashland sought indemnity  
13 for Atlas and a guarantee of Atlas' performance from Defendants. *Id.*, ¶ 15. Ashland  
14 alleges that Atlas, by way of attorney, refuses to indemnify Ashland (*id.*, ¶ 23) and that  
15 Leo Long denied responsibility to indemnify Ashland (*id.*, ¶ 22). Finally, Ashland alleges  
16 that it settled with Mrs. Clauson. *Id.* ¶ 24.

#### 17 **B. The 1985 Purchase and Sale Agreement**

18 In 1975, U.S. Filter Company purchased two separate foundries, the Long Foundry  
19 and the Atlas Foundry, in two separate transactions. The Long Foundry, located in  
20 Hoquiam, Washington, became "New Atlas 2," a wholly owned subsidiary of U.S. Filter  
21 Company. The Atlas Foundry, located in Tacoma, Washington, became "New Atlas," a  
22 separate wholly owned subsidiary of U.S. Filter Company. In the early 1980s, Ashland  
23 Oil or Ashland Technologies purchased U.S. Filter Company. As of its closure in 1984,  
24 Ashland Technology, Inc. operated the Long Foundry under an assigned lease.  
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26 In May 1985, Atlas purchased certain assets and assumed certain liabilities relating  
27 to Ashland Technology, Inc.'s foundry business by executing a PSA with Ashland  
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1 Technology, Inc. Leo Long signed the PSA on behalf of Atlas as president of the  
2 company. Leo Long and his brother Tom Long also signed the PSA as guarantors. The  
3 parties dispute what assets and/or liabilities were actually transferred in the PSA.  
4 According to Defendants, the real property listed in Exhibit A to the PSA was transferred,  
5 which included the Atlas Foundry located in Tacoma, Washington. *See* Dkt. 10 at 2-3.  
6 According to Ashland, the PSA also transferred Ashland Technology, Inc.'s interest in  
7 the Long Foundry, located in Hoquiam, Washington, to Atlas. *See* Dkt. 18 at 2-3.

#### 8 **C. The Origins of AmeriCast**

9 Shortly after the PSA, Leo Long bought out Tom Long and managed Atlas until  
10 1989. In 1989, Atlas was sold to an entity owned by TIC United Corporation ("TIC").  
11 That entity subsequently became Atlas Foundry & Machine Company, a division of TIC.  
12 TIC entered bankruptcy proceedings in 2000. Atlas Foundry & Machine Company  
13 continued to operate during the pendency of the bankruptcy proceeding. In 2002,  
14 pursuant to a purchase and sale agreement, TIC transferred its Atlas assets and certain  
15 liabilities to Atlas Foundry, LLP. AmeriCast Technologies, Inc. is the successor-in-  
16 interest to Atlas Foundry, LLP.

#### 17 **D. The Clauson Suit**

18 On or about May 3, 2007, the Clausons initiated an action ("the Clauson suit")  
19 against Atlas Foundry Limited Partnership, Atlas Castings & Technology, and AmeriCast  
20 Technologies, Inc. (collectively, "AmeriCast") and Ashland in Grays Harbor County  
21 Superior Court. On May 15, 2007, the Clausons filed their first amended complaint in  
22 which they alleged that Judy Clauson's former husband, Clifford Eberwein ("Eberwein"),  
23 worked at the Long Foundry between 1979 and 1984. The amended complaint further  
24 alleged that Eberwein was exposed to asbestos fibers during such employment, and that  
25 Judy Clauson contracted mesothelioma after years of living with Eberwein. The  
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1 Clausons alleged that AmeriCast was liable for the Clausons' damages on the sole basis  
2 that AmeriCast was the successor-in-interest to the Long Foundry.

3 On August 6, 2007, the Clausons conducted a Rule 30(b)(6) deposition of  
4 AmeriCast. AmeriCast designated Duane J. Britschgi, then president of Atlas Castings &  
5 Technology, which was a division of AmeriCast Technologies, Inc. Mr. Britschgi had  
6 been employed with Atlas Foundry since 1978. According to Defendants, at that  
7 deposition AmeriCast produced historical documents in response to the Clausons'  
8 demands and Mr. Britschgi testified at length about such documents. Defendants  
9 maintain that Mr. Britschgi's testimony at this deposition confirmed by way of the 1985  
10 PSA, that Atlas purchased only the Atlas Foundry in Tacoma and not the Long Foundry  
11 in Hoquiam. Ashland contends that Mr. Britschgi was not involved in the 1985  
12 transaction and that he had no personal knowledge regarding what was transferred in the  
13 PSA. Ashland argues that "[t]he fact of the matter is that the only issue Mr. Britschgi can  
14 speak to is whether or not the Long Foundry was operating at the time of the sale. That is  
15 a fact completely irrelevant to the question of whether or not Ashland's interest in the  
16 Long Foundry passed to Atlas pursuant to the 1985 PSA." Dkt. 18 at 4.

17 On September 5, 2007, the Clausons filed a second amended complaint wherein  
18 they continued to allege that AmeriCast was liable for the Clausons' damages because it  
19 was a successor-in-interest to the Long Foundry. On December 20, 2007, AmeriCast  
20 moved for summary judgment on the basis that AmeriCast was not a successor-in-interest  
21 to the Long Foundry. Ashland filed a brief opposing the motion. According to  
22 Defendants, Ashland opposed AmeriCast's motion on the same basis that Ashland bases  
23 its complaint in the instant suit, i.e., that the 1985 PSA transferred interest in the Long  
24 Foundry to Atlas. However, Ashland maintains that it opposed the motion in the Clauson  
25 suit to insure that the scope of the motion was restricted to the relief requested and did not  
26 include a finding that Ashland was a successor-in-interest to the Long Foundry. Dkt. 18  
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at 10. The judge granted AmeriCast’s motion and stated on the record that “I cannot reasonably construe the language in the 1985 purchase and sale agreement to constitute a transfer of the Long Foundry liabilities to Atlas,” and that “I likewise find that the 2002 transaction did not result in a transfer of any liabilities that may have been passed to Atlas at that point to Atlas Foundry Limited Partnership, so I am going to grant your motion.” Dkts. 8-4 & 8-5.

### III. DISCUSSION

#### A. Motions to Dismiss

Fed. R. Civ. P. 12(b)(6) motions to dismiss may be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Department*, 901 F.2d 696, 699 (9th Cir. 1990). Material allegations are taken as admitted and the complaint is construed in the plaintiff’s favor. *Keniston v. Roberts*, 717 F.2d 1295 (9th Cir. 1983). “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007) (*internal citations omitted*). “Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact).” *Id.* at 1965. Plaintiffs must allege “enough facts to state a claim to relief that is plausible on its face.” *Id.* at 1974.

#### 1. Judicial Notice

As a general rule, courts may not consider materials beyond the pleadings when ruling on a 12(b)(6) motion. *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001). The Court, however, may take judicial notice of public records when considering a 12(b)(6) motion to dismiss. *See Shaw v. Hahn*, 56 F.3d 1128, 1129 n. 1 (9th Cir. 1995).

1 Facts are subject to judicial notice if they are “capable of accurate and ready  
2 determination by resort to sources whose accuracy cannot be reasonably questioned.”  
3 *United States v. Ritchie*, 342 F.3d 903, 909 (9th Cir. 2003) (quoting Fed. R. Evid.  
4 201(b)(2)).

5 Defendants argue that the Court may take judicial notice of certain documents that  
6 have been submitted by the parties. Dkt. 10 at 9-10. Specifically, Defendants assert that:

7 The public records in this case include (1) two deposition transcripts of Mr.  
8 Britschgi, (2) an excerpt from the verbatim report of proceedings in the  
9 Underlying Action in which the Court finds that Atlas was not a  
10 successor-in-interest to the Long Foundry, and (3) the Order in the  
Underlying Action granting AmeriCast’s Motion for Summary Judgment.

11 *Id.* With regard to the deposition, a deponent is not a source whose accuracy cannot be  
12 reasonably questioned. Therefore, the Court declines to take judicial notice of Mr.  
13 Britschgi’s deposition.

14 On the other hand, the Court will take judicial notice of the excerpt and the order  
15 from the underlying proceeding.

## 16 **2. Defendants’ Motion**

17 Defendants argue that the “Court should dismiss Ashland’s Complaint against Mr.  
18 Long because the Complaint fails to ‘state a claim to relief that is plausible on its face.’”  
19 Dkt. 10 at 9 (quoting *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009)). Defendants  
20 contend that the material from the underlying proceeding, or “incontestable evidence,”  
21 shows that the PSA did not include the liabilities of the Long Foundry in Hoquiam,  
22 Washington. In other words, Defendants contend that the allegation contained in  
23 paragraph 7 of Ashland’s complaint is false. The problem with Defendants’ argument is  
24 that they are asking the Court to assess the veracity of Plaintiff’s allegations when the  
25 Court is charged with assessing the sufficiency of the allegations.

26 Ashland has alleged the existence of a contract in which Defendants agreed to  
27 indemnify and guarantee certain liabilities. As such, Ashland has set forth allegations  
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1 that, “even if doubtful in fact,” raise a right to relief above the level of speculation. *See*  
2 *Twombly*, 127 S. Ct. at 1974. Therefore, the Court denies Defendants’ motion to dismiss  
3 Ashland’s complaint.

## 4 **B. Defendants’ Motion for Summary Judgment**

### 5 **1. Summary Judgment Standard**

6 Summary judgment is proper only if the pleadings, the discovery and disclosure  
7 materials on file, and any affidavits show that there is no genuine issue as to any material  
8 fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).  
9 The moving party is entitled to judgment as a matter of law when the nonmoving party  
10 fails to make a sufficient showing on an essential element of a claim in the case on which  
11 the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323  
12 (1985). There is no genuine issue of fact for trial where the record, taken as a whole,  
13 could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec.*  
14 *Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must  
15 present specific, significant probative evidence, not simply “some metaphysical doubt”).  
16 *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists if  
17 there is sufficient evidence supporting the claimed factual dispute, requiring a judge or  
18 jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477  
19 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d  
20 626, 630 (9th Cir. 1987).

22 The determination of the existence of a material fact is often a close question. The  
23 Court must consider the substantive evidentiary burden that the nonmoving party must  
24 meet at trial – e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477  
25 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The Court must resolve any factual  
26 issues of controversy in favor of the nonmoving party only when the facts specifically  
27 attested by that party contradict facts specifically attested by the moving party. The  
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1 nonmoving party may not merely state that it will discredit the moving party's evidence at  
2 trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elec.*  
3 *Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson*, 477 U.S. at 253). Conclusory,  
4 nonspecific statements in affidavits are not sufficient, and missing facts will not be  
5 presumed. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888-89 (1990).

## 6           **2. Collateral Estoppel**

7           Defendants argue that Ashland should be precluded from litigating this action  
8 based on the doctrine of collateral estoppel. Dkt. 10 at 13-15. Federal courts sitting in  
9 diversity jurisdiction apply the issue preclusion rules of the forum state. *Pardo v. Olson &*  
10 *Sons, Inc.*, 40 F.3d 1063, 1066 (9th Cir. 1994). In Washington, the party asserting  
11 collateral estoppel bears the burden of persuading the court:

12           (1) the issue decided in the prior adjudication is identical with the one  
13 presented in the second action; (2) the prior adjudication must have ended  
14 in a final judgment on the merits; (3) the party against whom [collateral  
15 estoppel] is asserted was a party or in privity with the party to the prior  
adjudication; and (4) application of the doctrine does not work an injustice.

16 *State v. Vasquez*, 148 Wn.2d 303, 308 (2002). In addition, collateral estoppel precludes  
17 only those issues actually litigated and necessarily determined in a prior action.  
18 *Shoemaker v. Bremerton*, 109 Wn.2d 504, 507-08 (1987).

19           In this case, Defendants have failed to persuade the Court that collateral estoppel  
20 should be applied for at least two reasons: (1) Defendants have failed to show that the  
21 assumption of liabilities under the PSA was necessarily determined in the prior action,  
22 and (2) Defendants have failed to show that application of the doctrine would not work an  
23 injustice.

### 24           **a. Necessarily Determined**

25           If there is ambiguity or indefiniteness in a verdict or judgment, collateral estoppel  
26 will not be applied as to that issue. *Mead v. Park Place Properties*, 37 Wn. App. 403  
27 (1984). "If a judgment of a court of first instance is based on determinations of two  
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1 issues, either of which standing independently would be sufficient to support the result,  
2 the judgment is not conclusive with respect to either issue standing alone.” Restatement  
3 (Second) of Judgments § 27, comment I.

4 Ashland argues that the judgment in the underlying action was “based on two  
5 independent grounds,” one based on the PSA and one based on the 2002 bankruptcy  
6 transaction. Dkt. 18 at 12-13. AmeriCast’s brief in the prior action argued that “even if  
7 Atlas assumed liabilities relating to Long Foundry in 1985, Atlas Foundry, LLP did not  
8 assume such liabilities in 2002.” Dkt. 11, Declaration of Guy J. Sternal, Exhibit D at 6-7.  
9 The order, however, fails to specify on what ground the court granted Atlas’ motion. *See*  
10 Dkt. 8-5. The independent, proposed grounds for entering judgment in Atlas’ favor  
11 creates an ambiguity and indefiniteness in the underlying judgment and the judgment is  
12 not conclusive with respect to either issue standing alone. Therefore, the Court denies  
13 Defendants’ motion for summary judgment because Defendants have failed to show that  
14 assumption of liabilities under the PSA was an issue necessarily determined in the prior  
15 action.  
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#### 17 **b. Injustice**

18 The injustice element is “most firmly rooted in procedural unfairness. ‘Washington  
19 courts look to whether the parties to the earlier proceeding received a full and fair hearing  
20 on the issue in question.’” *Thompson v. Dep’t of Licensing*, 138 Wn.2d 783, 795-6  
21 (1999) (quoting *In re Marriage of Murphy*, 90 Wn. App. 488, 498 (1998)). In other  
22 words, a court should “focus on whether the parties to the earlier adjudication were  
23 afforded a full and fair opportunity to litigate their claim in a neutral forum.” *Nielson By*  
24 *and Through Nielson v. Spanaway General Medical Clinic, Inc.*, 135 Wn.2d 255, 264-65  
25 (1998).

26 In this case, Ashland argues that it did not have a full and fair opportunity to  
27 litigate its claim in the underlying action because Ashland’s current claim was not present  
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1 in the underlying action. Ashland and Defendants were co-defendants in the action  
2 brought by Mrs. Clauson and neither defendant filed cross-claims. Further, Ashland  
3 argues that it had no incentive to vigorously contest the interpretation of the PSA in the  
4 underlying action. The Court agrees with Ashland that Ashland did not have a full and  
5 fair opportunity to litigate its breach of contract claims in the underlying action. In fact,  
6 the claim wasn't even presented in the underlying action. Therefore, the Court denies  
7 Defendants' motion for summary judgment because Defendants have failed to show that  
8 Ashland received a full and fair opportunity to litigate its claims.

#### 9 **IV. ORDER**

10 Therefore, it is hereby **ORDERED** that Defendants' motions to dismiss and for  
11 summary judgment (Dkts. 10 & 14) are **DENIED**.

12 DATED this 12th day of May, 2011.

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16 BENJAMIN H. SETTLE  
17 United States District Judge  
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